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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 251

SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings and opinions of the Indian Claims Commission are reported at 9 Ind.Cl.Comm. 538, 544; 4 Ind.Cl.Comm. 250, 259; and 2 Ind.Cl.Comm. 183, 189. The opinions of the Court of Claims are reported at 315 F.2d 378 and 111 F.Supp. 766.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1963. The petition for a writ of certiorari was filed on July 2, 1963. The jurisdiction of

this Court is invoked under 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1055, 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether the Indian Claims Commission properly offset against the amount it awarded petitioner a sum, equal to the award, that had been gratuitously expended by the United States in purchasing land for petitioner.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050, 25 U.S.C. 70a, in pertinent part reads as follows:

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of

Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478 and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

STATEMENT

By the Act of March 2, 1889, c. 405, 25 Stat. 888, six separate Indian reservations were carved out of the Great Sioux Reservation in Dakota Territory. One of these reservations was set apart for the Lower Brule Sioux. The 1889 Act defined the southern boundary of the reservation set aside for the Lower Brule Sioux as running along the 44th parallel of latitude (Pet. App. 20, Fdg. 9). Using the most modern instruments and technology available at the time, the United States surveyed and monumented

the southern boundary line along its 42-mile length and for 44 years the parties mutually acted upon the assumption that the monumented line was the boundary (Appendix, *infra*, pp. 14-15, Fdgs. 4-6). Improved instruments and methods eventually revealed that there was an error in the survey in locating the 44th parallel, resulting in the exclusion of 25,968.24 acres that were supposed to be part of the Lower Brule Reservation (Pet. App. 20-21, Fdg. 11).

On October 19, 1950, the Lower Brule Sioux instituted this suit under the Indian Claims Commission Act to recover compensation for the land in the excluded area. The Commission dismissed the suit, 2 Ind.Cl.Comm. 189, was reversed by the Court of Claims, 111 F.Supp. 766, and thereafter awarded the petitioner $19,476.18 for the excluded acreage, 4 Ind.Cl.Comm, 259, 266-268. Later the Commission found that the petitioner was entitled to just compensation under the Fifth Amendment for the excluded land, allowed a credit of $658.07 against the award, and added interest to the reduced principal sum, thereby increasing the total award to $71,747.63, 9 Ind.Cl.Comm. 544, 547-550, 555-556 (Pet. App. 22-23, Fdg. 35).

Between 1936 and 1950, the United States expended $157,404.46 for the purchase of other land for the Lower Brule Sioux, under authority of Section 5 of the Act of June 18, 1934, 48 Stat. 984, 985, 25 U.S.C. 465. Section 2 of the Indian Claims Commission Act, *supra*, p. , allows the Commission to consider expenditures made under Section 5 of the 1934 Act and, in its discretion, to offset such, ex-

penditures against tribal awards. After making numerous findings concerning the expenditure (Appendix, *infra*, pp. 16-18, Fdgs. 30-33), the Commission found that (Pet. App. 22, Fdg. 34):

> * * * the course of dealings between plaintiffs and defendant has not been such that the defendant is prohibited from setting up against the award previously entered against it any credits or offsets which it may have that are not precluded by Section 2 of the Indian Claims Commission Act, 60 Stat. 1049.

Consequently, the Commission applied $71,747.63 of the $157,404.46 expended by the United States as an offset against the tribal award of $71,747.63, leaving a balance of $85,656.83 in the United States' favor, to be considered in any subsequent litigation between the parties, 9 Ind.Cl.Comm. 538, 544, 554-555 (Pet. App. 23, Fdg. 36).

The Court of Claims unanimously affirmed the decision of the Indian Claims Commission, 315 F. 2d 378 (Pet. App. 15-19).

ARGUMENT

The decision of the Court of Claims is plainly correct, and there is no occasion for this Court to review it.

1. Section 2 of the Indian Claims Commission Act provides:

> * * *; the Commission may also inquire into and consider all money or property given to or funds expended gratitously for the benefit of the claimant and if it finds that the nature of

> the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, * * *.

The Indian Claims Commission acted within its clear and specific statutory authority under Section 2 of the Indian Claims Commission Act, *supra*, p. , when it offset against petitioner's award the expenditures made by the United States in purchasing land for petitioner.

Petitioner's contention appears to be that the Commission had no authority to make the offset because the award was for a Fifth Amendment taking. Neither the express language of the statute nor the legislative history relied upon by petitioner supports that argument (Pet. 9-11). A fair reading of that history shows that the two Houses originally disagreed over the deduction of gratuities from awards for legal and equitable (as distinguished from moral) claims. The compromise finally agreed upon specifically enumerates certain types of gratuities that are not to be set off against any award (*supra*, p.). But all other gratuities were permitted to be deducted, at the discretion of the Commission, from legal and equitable, as well as moral, awards. House Conf. Rept. No. 2693, 79th Cong., 2d sess. (1946), pp. 6-7 (Pet. 10-11). Nothing in the history of the Act or in the plain words of the pertinent portion of the statute, *supra*, p. , indicates that a claim found by the Commission to be based upon the Fifth

Amendment was to receive preferential treatment. What the history does show is that Congress specifically contemplated the offset of expenditures for the purchase of land, such as those involved here (H. Conf. Rept. No. 2693, 79th Cong., 2d sess. (1946), p. 7):

> The bill does permit the Commission, where it finds that the nature of the claim and the entire course of dealing between the claimant and the United States warrants such action, to set off other gratuitous expenditures recognized to be for the direct benefit of the Indians, *such as expenditures made for the purchase of land.* [Emphasis added.]

2. Petitioner's second contention is that the Commissioner failed to make the necessary finding that "the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants" the offset.

The first nine findings of the Commission (App., *infra*, p.) relate to the "nature of the claim"; and virtually every finding relates to the "course of dealings" between the parties. These findings, together with the record, constitute an entirely adequate basis for ultimate Finding No. 34 (*supra*, p. 5) (Pet. App. 22). Cf. *Alger* v. *United States*, 171 F. 2d 667, 668 (C.A. 7); *Klimkiewicz* v. *Westminster Deposit & Trust Co.*, 122 F. 2d 957, 958 (C.A. D.C.), certiorari denied, 315 U.S. 805. Furthermore, respondent's quarrel with the content of that ultimate finding is purely verbal; to say, as the court did, that the course of dealings between the parties

"has not been such that the defendant is prohibited from setting up" the credit is tantamount to saying that the course of dealings "in good conscience warrants" the offset. The fact that the court did not parrot the language of the statute does not suggest that its finding was not made "in good conscience." The form of ultimate finding employed here has consistently been relied upon by the Court of Claims in Indian claims cases. *Quapaw Tribe of Indians* v. *United States*, 128 C. Cls. 45, 62; cf. *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265, 288 (C. Cls.) certiorari denied, 350 U.S. 848.

The court below correctly disposed of petitioner's contention that more detailed findings are needed (315 F. 2d at 380):

> * * * Congress plainly contemplated the offset of such a claim. Nor do we think the Commission was required to set out in detail the entire course of dealing between the tribe and the United States to support its finding that the offset was allowable. That would require voluminous findings in each case in which an offset was claimed. The Commission was merely directed to take them into consideration in determining whether in good conscience the offset should be allowed. In good conscience it thought it ought to be. We do not think it was required to set out all the things that went toward satisfying its conscience. This is especially true in the case of an offset under section 5 of the 1934 act, which Congress so plainly thought should be allowed.

Petitioner lays stress on the fact that the government has the burden of proving its entitlement to the offset. Certainly the government must establish that gratuities in the claimed amount were in fact made. Where, as here, the government has made a prima facie showing that its conduct toward the Indians has been fair and honorable—as it has plainly done here in purchasing land for them—it is the tribe's responsibility, we submit, to come forward with specific evidence, or at least a specific allegation, of impropriety. Having failed to specify any respect in which the government's conduct was tainted, respondent clearly cannot complain that the court has abused its discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
RICHARD N. COUNTISS,
Attorneys.

AUGUST 1963

APPENDIX

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 78

THE SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Decided: May 29, 1952

Appearances:

Ralph H. Case,
Attorney for Plaintiffs.

Maurice H. Cooperman, with whom was Mr. Assistant Attorney General, Wm. Amory Underhill,
Attorneys for Defendant.

FINDINGS OF FACT

1. The plaintiffs are Sioux Indians referred to in the Act of Congress approved March 2, 1889, as the Indians, or their descendants, receiving rations and annuities at the Lower Brule Agency, South Dakota, and as such are entitled to institute this action under the Indian Claims Commission Act.

2. By Section 5 of the Act approved March 2, 1889 (25 Stat. 888, 889, I Kapp. 329) there was set apart for the Sioux Indians, receiving rations and annuities at the Lower Brule Agency, the lands described as follows:

> That the following tract of land, being a part of the said Great Reservation of the Sioux Na-

tion, in the Territory of Dakota, is hereby set apart for a permanent reservation for the Indians receiving rations and annuities at the Lower Brule Agency, in said Territory of Dakota, namely: Beginning on the Missouri River at Old Fort George; thence running due west to the western boundary of Presho County; thence running south on said western boundary to the forty-fourth degree of latitude; thence on said forty-fourth degree of latitude to western boundary of township number seventy-two; thence south on said township western line to an intersecting line running due west from Fort Lookout; thence eastwardly on said line to the center of the main channel of the Missouri River at Fort Lookout; thence north in the center of the main channel of the said river to the original starting point.

3. B. H. Sullivan, United States Surveyor General for the District of Dakota, issued special instructions to Edwin H. Van Antwerp, United States Deputy Surveyor, dated March 12, 1890, for the purpose of establishing the lineal boundaries of the Lower Brule Reservation, which read in part as follows:

> The present western terminus of the established 1st. standard parallel north is the standard corner to townships 5 north of ranges 75 and 76 west. From this standard township corner, if it can be completely identified, you will extend said standard parallel on a true latitude curve. If said standard township corner cannot be assuredly determined, you will go to the most westerly established standard corner which can be completely identified and from it retrace the standard to the line between ranges 75 and 76 west, T. 105 N. restoring the missing corners,

and then continue the standard parallel as stated to the S. W. standard corner for T. 105 N., R. 79 W. The correct establishment of this corner must have your special attention and it should so appear in your notes, as both the west boundary of the Lower Brule Indian reservation and line upon which two systems of survey close, depend upon its determined position.

* * * *

From the standard corner for west boundary of range 79 west, on the 1st. standard parallel north, * * * you will run the range line due north, establishing at the legal distances, the usual quarter-section, section and township corners until at 24 miles you will establish the closing corner of said range line upon the 2nd standard parallel. Thence you will run due west on said 2nd. standard parallel 35.57 chains and establish the standard ¼ section corner on south boundary of section 31, T. 109 N., R. 79 W., marked in the usual manner and at 75.57 chains, set the S. W. standard corner for T. 109 N., R. 79 W. of the 5th P. M. From the last named standard corner, you will continue the west boundary of range 79 due north establishing at the legal distances the usual quarter section, section and township corners until you arrive at a point due west from Old Fort George as near as you can estimate, where you will set a temporary point for the northwest corner of said reservation.

You will then proceed to Old Fort George. As no diagram of the Post or plan of the buildings can be found, you will determine the middle point of the ruins as the place for the initial point of the boundary of the Lower Brule Indian reservation, * * *. You will then return

to the said initial point at Old Fort George and run thence due west establishing half-mile and mile corners at each 40 and 80 chains counting from the initial point, and at intersection with the west boundary of range 79, you will establish the *permanent* northwest corner of the said reservation, destroy the temporary corner so stating in your notes, and perfect your range boundary entries.

* * * *

Measurements of the west boundary of range 79 and of connecting lines will be carefully made. Measurements along the 1st standard parallel and the north and south boundaries of said reservation will be made by two sets of chainmen; and you will do what may be necessary to prevent collusion, the object being to obtain two independent reports from your chainmen, which may thereby serve as a check on possible error.

* * * *

I enclose herewith copies of the Act approved March 2, 1889 and of the President's proclamation of February 10, 1890, giving effect to said Act. You will carefully read both and ascertain the rights of resident Indians upon the ceded lands set forth * * *.

* * * *

* * * you are advised that the position of the S. W. corner of said reservation, the same being the intersection of the parallel of 44° with the west boundary of range 79 west, is to be established by you at a point on said range boundary distant *11 miles 38.34 chs. north* from the S. W. standard corner to T. 105 N., R. 79 W. on the 1st standard parallel. * * *.

4. Geodetic Triangulation is the most modern and exact method known for establishing the ground location of Meridians and Parallels. In 1890 the Coast & Geodetic Survey had prosecuted its triangulation station network westward only as far west as Central Kansas and was then more than 400 miles from Presho. It was therefore necessary to survey the Lower Brule reservation as a detached individual project and by astronomic observations.

In 1890, there was in general use by field surveyors of the General Land Office, transits with a solar attachment graduated to 1′ on the vernier, which is the equivalent of 6000 ft. on the ground. Measurements were then made with the now archaic link chain. They also used a sextant to check their ground location but that instrument also was too crude to enable the surveyor to detect so small an error as one mile on the ground.

The first Standard Parallel is a surveyed monumented line established by the General Land Office. It was officially located at 43° 50′ north latitude. During 1877-88 it had been surveyed and monumented westward to Tp. 76.

In conformity with his instructions, Van Antwerp surveyed and monumented the First Standard Parallel westward from range 75 to 79 by two sets of chainmen working independently and from that intersection, similarly surveyed a line due north 11 miles 38.34 chains (10′ of latitude translated by Sullivan into horizontal distance) and thus located the 44th parallel of latitude—the southwest corner of the reservation.

At the point so determined he confirmed his position as being on the 44th parallel by the Solar Transit, however the degree of refinement of the instrument —1′ on the vernier—means a possible deviation of

6000 ft. on the ground. In 1890 no deviation within 6000 ft. of the theoretically correct position was susceptible of detection. Neither the Sextant nor solar transit permitted any greater degree of exactitude.

5. Since the year 1890 the Coast and Geodetic Survey and the United States Geological Survey each has established many new and adjusted triangulation points from which the geographical location of meridians and parallels may be more accurately determined. These points, and the more improved surveying instruments available, have from time to time altered the position of the lines of latitude and longitude as represented upon topographical maps. These changes on the maps did not in fact change the location of the monuments actually placed on the ground at the time of the survey of the lands in 1890.

6. The 44th parallel as established in 1890 and as marked by monuments was and is the officially determined and approved southern boundary of the Lower Brule Reservation, and was an official declaration of the correct position on the ground of the southern boundary of the reservation. The boundary as then determined, laid out, and monumented was mutually recognized for 44 years, and was consistently acted upon by both parties and is today the recognized southern boundary of the reservation.

7. In drawing meridian and parallel lines upon maps, the compiler locates them by reference to fixed points established. As these fixed established points are revised with the progress of the geodetic work, the position of latitude lines upon maps changes correspondingly. This inconstant or ambulatory character of meridians and parallels is an inherent attribute of longtiude and latitude lines appearing upon maps.

8. No actual survey on the ground has ever been made locating the 44th parallel of latitude.

* * * *

Decided: October 27, 1961

ADDITIONAL FINDINGS OF FACT

The following additional findings of fact are supplemental to the findings numbered 1 through 23 made in the prior decisions of this Commission in this case (2 Ind. Cl. Comm. 189, reversed 125 C. Cls. 439; 4 Ind. Cl. Comm. 250).

* * * *

30. Section 5 of the Act dated June 18, 1934, 48 Stat. 984, provides in part:

> The Secretary of the Interior is hereby authorized, in his discretion to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, * * * including trust or otherwise restricted allotments whether the allottee be living or deceased, * * * for the purpose of providing land for Indians.
>
> For the acquisition of such lands, * * * and for expenses incident to such acquisition, there is hereby authorized to be appropriated out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: * * *.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired,

and such lands or rights shall be exempt from State and local taxation.

Between March 11, 1936 and August 15, 1950, the Secretary of the Interior, pursuant to the foregoing Act, acquired for the Lower Brule Sioux several tracts of land at a total expenditure of $157,404.46.

31. In support of this offset the defendant introduced in evidence, as defendant's exhibit 04, photostats of the 57 original vouchers in the possession of the General Accounting Office covering all of these purchases. Each voucher shows: voucher number, date of acquisition, legal description of the property, acreage, price per acre, total cost, government check number, date of issue, amount, and the vendor's signature acknowledging receipt of payment for the land. Each voucher states that the land was purchased under the authority contained in section 5 of the foregoing Act, that, as there directed, title was taken in the name of the United States in trust for the Lower Brule Sioux, and shows the volume, page and county where the deed was recorded.

32. The summary statement or tabulation which forms a part of defendant's exhibit 04 lists each of the 57 vouchers by its number and dollar amount. The tabulated total of the face amount of the vouchers is there shown as $157,593.89, or $189.43 more than the $157,404.46 which had been alleged as offsets by the defendant. The reduction of $189.43 was explained by the defendant's witness, Joe B. Wilson, Assistant Chief, Indian Tribal Branch, General Accounting Office, as follows (Tr. 23-24):

> Voucher No. 9-55737 includes an overpayment of $9.10 for taxes, which was later collected. This effected a reduction in that amount—$9.10.
>
> Voucher No. 9-24871 reflects a transposition of the figures used by examiner who misread

the correct figures $3,209.25 as $3,029.25. This effected a reduction of $180.00.

Voucher No. 9-24869 shows the amount paid as $18,548.33 whereas the examiner in preparing the GAO report (Def. Ex. 01, p. 146) omitted the 33 cents, effecting a reduction in that amount.

The foregoing differences aggregating $189.43 account for the discrepancy between the tabulated total of the amounts appearing in the vouchers—$157,593.89 (Def. Ex. 04), and the total amount of $157,404.46 appearing in both the G.A.O. Report (Def. Ex. 01, pp. 142, 146) and the defendant's second amended answer (par. 48, p. 11) as alleged offsets.

33. The Commission concludes that the total amount of $157,404.46 expended by the United States pursuant to section 5 of the Wheeler-Howard Act, 48 Stat. 984, in acquiring for the Lower Brule Sioux the lands described in the 57 vouchers (Def. Ex. 04) constitutes a proper offset against the Commission's award in this action.

* * * *

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

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